

LEGAL REVIEW NOTE

LC#: LC0657 To Legal Review Copy, as of
January 29, 2015

Short Title: Provide for higher education seeded
savings accounts

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0657 establishes the "best bet savings account program." The program allows parents of newborns in Montana to elect to start a higher education savings account. Under the program, the state opens and administers the account and matches parental contributions to the account up to \$200. Section 2. The program is funded from lottery revenues. Section 3. The savings account may only be used for "qualified higher education expenses" as defined in 15-62-103. Section 2. The Commissioner of Higher Education administers the program and administrative fees are capped at 5%. Section 2.

Control of the State

LC0657, as drafted, may raise a potential constitutional conformity issue associated with Article V, section 11(5), of the Montana Constitution. Article V, section 11(5), provides: “No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not ***under control of the state.***” (Emphasis added.)

The potential constitutional conformity issue raised is whether the best bet savings account program as outlined in LC0657 is sufficiently "under the control of the state." The legislation requires the Commissioner to administer the program and to establish conditions for the establishment of the accounts. Section 2. The accounts may only be used for "qualified higher education expenses," which, under 15-62-103(13) and Section 529(e)(3) of the Internal Revenue Code, are defined as "tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution." However, the educational institution may be either public or private.

The issue of "state control" has been discussed in prior Montana Supreme Court cases. For example, in *Grossman v. State*, 209 Mont. 427 (1984), the plaintiff contended that legislation authorizing the issuance of bonds for the department of natural resources and conservation's development of hydroelectric power violated Article V, section 11(5), because some private entities could benefit from cheap power. The Montana Supreme Court discounted this argument, stating: "The constitutional provision is not violated because the legislation may in making appropriations or other provisions in some way benefit incidentally various private individuals, associations or corporations not under the control of the state. As long as the provision related to the expenditure of funds derived from the proceeds of the bonds are under the control of the state, the constitutional mandate is satisfied." *Grossman*, 209 Mont. at 455-56.

The Montana Supreme Court has concluded that public assistance to indigent expectant mothers is not an unconstitutional appropriation under Article V, section 11(5), simply because a mother may request the counseling and assistance of a private adoption agency. *Montana State Welfare Bd. v. Lutheran Social Services*, 156 Mont. 381, 390-91 (1971).

However, in *Hollow v. State*, 222 Mont. 478 (1986), the Montana Supreme Court held that legislation permitting the use of in-state investment funds derived from taxation to guarantee loans or bonds of private individuals or entities was unconstitutional. According to the Court, the pledge of state credit to the benefit of private entities offended Article V, section 11(5), and was constitutionally impermissible. *Hollow*, 222 Mont. at 485-86.

Consequently, the potential constitutional conformity issue rests on whether the proposed program, funded by the state lottery revenues, is sufficiently under the control of the state for the mandate of Article V, section 11(5), to be satisfied.

Aid to Sectarian Schools

LC0657, as drafted, may also raise potential constitutional issues associated with Article X, section 6, of the Montana Constitution. Article X, section 6, provides:

Section 6. Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

In *State ex rel. Chambers v. School District No. 10*, 155 Mont. 422 (1970)¹, the Montana Supreme Court considered whether a payment of funds by a public school board for the employment of teachers in a private school violated the Montana Constitution. The school board contended that the local parochial school was an "integral and important part of the public and private education system" which "complied with standards set by the superintendent of public instruction" and thus "pursued a secular function in addition to its sectarian function." *State ex rel. Chambers*, 155 Mont. at 430. The Supreme Court ruled that the payments were a violation of the principle of separation of church and state and therefore, unconstitutional. *Id.*

However, in *Montana State Welfare Bd. v. Lutheran Social Services*, 156 Mont. 381 (1971), the Montana Supreme Court concluded that public assistance to an indigent expectant mother, which could possibly be later distributed to a religiously affiliated adoption agency, did not "directly or indirectly benefit" the adoption agencies. *Id.*, 156 Mont at 391.

As drafted in LC0657, the best bet savings account could theoretically be used to pay for expenses for attending a college with a religious affiliation. The potential constitutional conformity issue raised pursuant to Article X, section 6, of the Montana Constitution is whether and to what extent the payments from the best bet savings account benefit a secular or sectarian purpose.

Board of Regents

Finally, LC0657 may raise a potential constitutional concern associated with Article X, section 9(2)(a), of the Montana Constitution, which provides: "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law." This provision grants a high degree of independence and

¹ Both *Montana State Welfare Bd.* and *State ex rel. Chambers* precede the 1972 Constitutional Convention; however, the provisions in question are nearly identical.

autonomy to the Board of Regents, subject only to the Legislature's power of appropriation.
Board of Regents v. Judge, 168 Mont. 433 (1975).

Here, LC0657 directs the Commissioner of Higher Education to establish and administer the best bet savings account program. This mandate may potentially raise a constitutional conformity issue regarding the Board's autonomy and independence.

Requester Comments: None.